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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEON KATZ, ROBERT A. WRIGHT, JOHN F. RAUHAUSER, JR., WILLIAM E. PFADT, On Their Own Behalf And On Behalf Of All Others Similarly Situated,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE PENNSYLVANIA BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE PENNSYLVANIA BAR ASSOCIATION AS AMICUS CURIAE[1] IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Pennsylvania Bar Association ("PBA") is a voluntary bar association whose regular membership is open to members of

1. This brief is filed with the consent of all parties pursuant to Rule 36.1 of the Court.

the Bar of the Commonwealth of Pennsylvania. Its membership is comprised of approximately 26,000 attorneys in Pennsylvania.

One of the important purposes of the PBA is to promote the administration of justice by monitoring the functioning of the judicial system in the state courts of Pennsylvania and developing proposals for improvement of the judicial system. The issue of mandatory retirement of judges is one which the PBA has reviewed. The PBA is authorized to pursue its goals through the filing of *amicus curiae* briefs in appropriate cases. The operation of the judicial system in Pennsylvania may be significantly affected by this case.

STATEMENT

In this litigation, petitioners, who at the time of their intervention in this action were Pennsylvania state court judges who would reach the age of 70 before the expiration of their terms of offices, challenge the constitutionality, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States, of article V, section 16(b) of the Pennsylvania Constitution and its implementing statute, 42 Pa. Cons. St. Ann. §3351 (Purdon 1981), requiring that judicial officers of Pennsylvania retire at the age of seventy.

This action was originally commenced in the Commonwealth Court of Pennsylvania by petition for review in the nature of a complaint for declaratory judgment. Petitioners subsequently intervened in the action and joined in challenging the constitutionality of the Pennsylvania constitutional and statutory provisions involved. In an Opinion and Order dated November 3, 1988 (A-24)[2], the Commonwealth Court denied petitioners' motion for summary relief and overruled the Commonwealth's preliminary objections. The Commonwealth Court also held, with respect to the federal constitutional issues, that the petition stated "a cause of action upon which the Pennsylvania constitutional provision mandating retirement of judges at

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2. References to the Appendix to the Petition for a Writ of Certiorari are denoted herein by the abbreviation 'A- '.

age 70 could be declared unconstitutional under the United States Constitution" (A-42), citing both Due Process and Equal Protection grounds (A-39). The Court stated that petitioners' federal constitutional arguments would have to be reviewed against an evidentiary record that was to be developed.

The Supreme Court of Pennsylvania, by Opinion dated March 1, 1989, sustained the Commonwealth's preliminary objections and dismissed the action (A-1). The Court rejected petitioners' challenge under the Pennsylvania and United States Constitutions. The Supreme Court held that no factual record need be developed to assess the federal constitutional issues, because, even assuming that petitioners' factual allegations could be proven, "they would not be relevant to the constitutional analysis presented." (A-14).

DISCUSSION

I. THE IMPORTANT CONSTITUTIONAL QUESTIONS INVOLVED AFFECT THE ADMINISTRATION OF THE STATE COURT SYSTEMS NATIONWIDE.

The issues involved in this case have broad national impact. There are currently approximately 27,429 state court judges in the United States.[3] At least thirty-six (36) of the states, including the District of Columbia, currently have in effect a mandatory retirement program for state court judges, either by statute or by state constitution. The majority of these states require judges to retire at the age of 70. Colorado, Iowa and South Carolina mandate retirement at 72. Indiana, Oregon, Texas and Washington have established 75 as the mandatory retirement age. Utah and North Carolina recognize a distinction for purposes of the mandatory retirement age between trial court judges, who must retire at age 70, and appellate court judges, who must retire at age 72. Two other states — California and Maine --

3. *State Court Organization - 1987*, Conference of State Court Administrators and National Center for State Courts, Tables 1 and 14, pp. 75-84, 198-207 (1988).

have no mandatory retirement age, but build into their judicial retirement plans financial disincentives to continuing service after age 70.[4]

The mandatory retirement age operates in several ways. In states where judges are appointed, the mandatory retirement age effectively acts as a condition of eligibility to hold appointive office. In states such as Pennsylvania, in which judges are elected, the mandatory retirement age acts as a condition for eligibility to stand for election. In both cases, the provisions typically require judges to retire upon attaining the mandatory retirement age. The mandatory retirement age may also affect the ability of a judge who has been appointed to serve out the remaining term of a vacancy that would be filled by election.[5] Although there are variations from state to state in the manner in which mandatory judicial retirement operates, typically these restrictions require a judge to retire at the end of the term or year in which the judge reaches the applicable mandatory retirement age.

Thus, the issues whether such state mandatory retirement provisions comport with the Constitution of the United States affect judges in a majority of the states and potentially affect 20,772 state court judges.[6] A decision by this Court in this case would have national importance and would settle issues that have been and are a frequent subject of time-consuming litigation that introduces an element of uncertainty in the functioning of the state courts.

II. THE CONSTITUTIONALITY OF MANDATORY RETIREMENT OF STATE JUDGES HAS NEVER BEEN ADDRESSED BY THIS COURT.

Although the Court had occasion a decade ago, in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976),

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4. Pyne & Sammons, *Judicial Retirement Plans*, 93-97 (1984).

5. In *Stout v. Commonwealth*, ____ Pa. ____, ____ A.2d ____, 49 BNA Fair Empl. Prac. Cas. 1419 (Pa. Supreme Court Opinion filed May 18, 1989), the Pennsylvania Supreme Court held that the same provisions involved in this case require a Justice of the Supreme Court of Pennsylvania appointed to fill a vacancy to retire at age 70.

6. *State Court Organization* at 75-84 and 198-207.

and *Vance v. Bradley,* 440 U.S. 93 (1979), to consider the constitutional issues surrounding mandatory retirement of police officers and foreign service personnel based on age, neither of the Court's previous decisions dealt with the constitutionality of such restrictions as applied to judges, and the holdings in those cases, as applied to judicial officers, have not been subjected to further significant refinement since. The application of the rationality requirement to the mandatory retirement provisions at issue in those cases turned on considerations uniquely appropriate to the particular government positions involved. Thus, in the case of the police officers in *Murgia,* the Court pointed to legislative studies of the nature of the job, which required "comparatively young men of vigorous physique" and which involved "duties to be performed in all weathers" that were characterized as "arduous in the extreme." 427 U.S. at 314 n.7. In *Vance v. Bradley, supra,* the Court pointed to legislative history documenting (i) "the continued strain of 30 years or more of service representing [the] Government in foreign countries in widely different climates and environments," and (ii) the requirement of "physical stamina" to perform effectively at any time at "some 300 posts throughout the world including those in isolated, primitive, or dangerous areas," 440 U.S. at 105, n.22.

Such considerations are not as germane to the rationality of mandatory retirement of state judges, who perform duties that are primarily intellectual and judgmental in nature under normal office conditions. Neither *Murgia* nor *Bradley* squarely resolves the question whether mandatory retirement of trial and appellate judges at age 70 is rational. Because of the absence of a definitive ruling by this Court, there continues to be a substantial amount of litigation in the state and federal courts on the issue of the constitutionality of mandatory judicial retirement based on age — an issue on which certainty is highly desirable for sound judicial administration of the state courts.

The Court should grant review to resolve a controversial issue of importance to the functioning of the state judicial systems nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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